Supreme Court, U.S.
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No. 01-741

In The

Supreme Court of the United States

ALLDATA CORPORATION, and ROBERT WEIFFENBACH, jointly and severally,

Petitioners,

v.

KAREN REED MILLER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF ISSUES

1. Did Plaintiff present sufficient evidence to raise a question of fact as to whether Defendants' claim that Plaintiff had sexually harassed male fellow employees was a pretext for sex discrimination?

2. Did Plaintiff present sufficient evidence to raise a question of fact as to disparate treatment, *e.g.*, as to whether Defendants discriminated against her with regard to the terms and conditions of her employment?

3. Did the trial court abuse its discretion in denying Defendants' Motion for a New Trial, where: (a) the verdict was not against the great weight of the evidence; (b) the trial court had correctly denied Defendants' request for leave to amend because the after-acquired evidence doctrine does not apply to post-termination conduct; and (c) Defendants' proposed jury special instructions were either duplicative of the standard jury instructions given to the jury, or inconsistent with the law.

STATEMENT OF THE CASE

This is a sex discrimination case brought pursuant to Michigan's Elliott-Larsen Civil Rights Act ("ELCRA"). Defendant, Alldata Corporation ("Alldata"), is a California corporation that produces and sells automotive repair software. Defendant Robert Weiffenbach was Alldata's senior vice-president of sales, managed Alldata's sales force, was Plaintiff's direct supervisor, and was a decisionmaker in Plaintiff's termination.

Plaintiff, Karen Reed Miller, had a long history of national sales experience in the industry and was hired by Alldata in October 1996 as one of three national representatives in its "Special Accounts Group." Plaintiff was the only woman in Weiffenbach's sales force. Plaintiff

"loved" the Alldata product and worked 80 to 90 hours per week promoting the same.

Plaintiff was, however, from almost the beginning, subject to constant belittlement and disparate treatment by Weiffenbach. For example, Defendant told Plaintiff: "you're the reason I never re-married"; rolled his eyes and criticized her in front of customers; gave her the title "manager" while the two similarly situated males were given the title "director" and paid $25,000 more per year; constantly criticized Plaintiff for travel expenses, while not criticizing males with similar expenses; rudely berated Plaintiff; and verbally abused her when she called to ask questions. *See infra.* This was strong evidence of disparate treatment as to terms and conditions of employment, prohibited by ELCRA. One former Alldata employee characterized Weiffenbach as a "chauvinist" who repeatedly referred to women in a lewd manner.

Weiffenbach acted on his gender bias when, in March 1997, he terminated Plaintiff's employment on bogus charges of "sexual harassment," then replaced her with a man whom he paid $12,500 more. Defendants argued there was a legitimate business reason for such action, however, the evidence showed that the "sexual harassment" claim was manufactured by Weiffenbach to facilitate his plan to replace Plaintiff with a man.

The case was tried to a jury in June 1999 and after a five-day trial, the jury returned a verdict for Plaintiff. The trial court denied Defendants' post-trial motions. Final judgment was entered on August 25, 1999.

The Sixth Circuit Court of Appeals affirmed in an unpublished opinion. Defendants sought rehearing en banc, which was denied after the petition failed to receive a single vote.

STATEMENT OF FACTS

A. Plaintiff Is Hired Along With Two Male Counterparts To Work As National Sales Representatives In Alldata's "Special Accounts Group"

Prior to Alldata, Plaintiff worked for a competitor, the Mitchell Corporation, from 1985 through 1995 as a national sales representative along with Harry Evangelist and Ted Mannheimer, each of whom sold to a different segment of the national market. (Miller, 81-86) (references are to trial transcript). At Mitchell, the three representatives were peers, with the same responsibilities and job titles. (Evangelist, 8-13).

During a six-month period in 1996, Mannheimer, Evangelist, and Plaintiff were hired in as national sales representatives for Alldata's newly created "Special Accounts Group." (Evangelist, 16). Alldata's president, Rod Giorgiu (who had known Plaintiff since 1988) hired her to obtain "value added reseller" or "VAR" accounts. (Evangelist, 26-28; Miller, 91, 79-81).

Plaintiff was to report directly to Weiffenbach and be paid $62,500 per year. (R. 105, Ex. 1). When Plaintiff asked Weiffenbach for a higher salary, he responded: "[T]hat's all I'm gonna pay." (Miller, 82).

Plaintiff, Evangelist, and Mannheimer were "similarly situated." For example, Evangelist testified that he, Mannheimer, and Plaintiff had "peer position[s]," that they were "back to being the same thing at Mitchell again," and that "[n]ow they had the Mitchell group at Alldata." Evangelist believed that Plaintiff was being paid the same amount. All three reported directly to Weiffenbach. (Evangelist, 28-29, Miller, 88).

Alldata's "Field Sales Organization Chart" showed Plaintiff, Evangelist, and Mannheimer on the same level, in the "Special Accounts" Group. (R. 105, Ex. 2, Miller,

86-87, Weiffenbach ("W") 101-102). Plaintiff was the only female salesperson in Weiffenbach's sales force. (W, 6; Evangelist, 34; Miller, 116).

B. Weiffenbach's Sexist Remarks; Disparate Treatment As To Similarly Situated Males; Less Pay For Similar Duties, And A Lesser Title

Plaintiff worked more than 80 hours per week, "loved" working at Alldata and believed that it had a "very, very good product." (Miller, 90, 124). Weiffenbach acknowledged Plaintiff was competent at her job, that he had confidence in her abilities, and that job performance had nothing to do with her termination. (W, 116).

Nevertheless, Weiffenbach constantly downgraded Plaintiff. For example, Weiffenbach regularly criticized Plaintiff in front of customers, interrupted her and stated things like "she doesn't know what she's talking about," while rolling his eyes; he did not treat the male sales representatives in a similar fashion. (Miller, 89, 111). When answering Plaintiff's phone calls, Weiffenbach (who had caller I.D.) would rudely answer: "What do you want now?" Weiffenbach did not answer calls from male employees in that manner. (Miller, 93-94, 112-113). Indeed, Weiffenbach answered Evangelist's phone calls by saying "Hi, Harry," in a "very pleasant" tone of voice. (Evangelist, 34). Also, Weiffenbach would often call Plaintiff at 5:00 a.m., when he knew she would not be awake (Weiffenbach lived and worked out of Colorado, two hours behind Michigan). (Miller, 94-95).

Weiffenbach told Plaintiff that she was "*the reason [he] never re-married.*" (Miller, 112).

In addition to verbal abuse, Weiffenbach treated Plaintiff less favorably than similarly situated male

employees as to other terms and conditions of employment. For example, Evangelist and Mannheimer were paid $87,500, $25,000 more than Plaintiff. (Evangelist 17, R 105, Exs 1, 3 & 4). Weiffenbach also gave Plaintiff the title of "Manager of Special Accounts" while Evangelist and Mannheimer were "Directors." *Id.* Weiffenbach told Plaintiff: "I would never had hired you as a director." (Miller, 112).

Weiffenbach constantly criticized Plaintiff about travel expenses. Alldata provided a booklet, "AutoZone Travel Guide," which set forth guidelines and limits as to expenses. However, Evangelist testified that, based on his 25 years of experience, the spending guidelines were "ridiculous" and "ludicrous" because they were impossible to comply with. (Evangelist, 30). Mannheimer testified that "we all thought it was a joke." (R. 101, Mannheimer, 40-41).

Evangelist's hotel and rental car expenses regularly exceeded the guidelines, but Weiffenbach *never* criticized him and never gave him a limit. (Evangelist, 30-33). Similarly, Mannheimer testified that *"you just exercised good judgment."* (R. 101, Mannheimer, 47) (emphasis added). Yet, Weiffenbach constantly criticized Plaintiff for renting mid-size cars instead of sub-compact cars, citing the guidelines (Miller often entertained important clients). (Miller, 91-92). In contrast, Evangelist *always* rented full-size cars, and was *never* questioned by Weiffenbach and Mannheimer was *never* told of such restrictions. (Evangelist, 32-33, Mannheimer, 41, 44). Further, Weiffenbach demanded that Plaintiff submit travel plans one month in advance (Miller, 117), while *not* requiring the same from Evangelist or Mannheimer. (R. 102, W, 123).

When Plaintiff presented a proposal regarding a sales program for ADAM Software, Weiffenbach responded:

"forget it, this is a lousy idea." However, after Plaintiff's termination, when Evangelist submitted the identical proposal (with Plaintiff's approval), Weiffenbach told him to take the next step to determine if it was viable. (Miller, 114-115; Evangelist, 34-35).

Weiffenbach had observed Mannheimer and Evangelist initiate and exchange hugs with Plaintiff as a greeting, but never reprimanded them for that conduct. (R. 102, W, 28, 48; Evangelist, 36).

According to Evangelist, Weiffenbach was *"a chauvinist,"* who used derogatory and lewd statements when referring to women "almost every time [they] were together." (Evangelist, 40) (emphasis added).

C. The Alleged "Sexual Harassment"

While Plaintiff admitted to sometimes touching people in a non-sexual manner, she explained that, over the years, she had developed a very personal style of selling that worked for her. Prior to Alldata, no one *ever* complained that Plaintiff touched them in a sexual or inappropriate manner. (Miller, 99-101, 108-110).

The reality, as described by Karlyn Oberg (Alldata Human Resources), was that Plaintiff is just an "outgoing, very friendly, very close person." (Oberg, 48). Evangelist had often observed Plaintiff hugging other persons but never in a sexual manner. (Evangelist, 35-36). Plaintiff was "a very friendly person" with a "very bubbly personality" and "would give people open hugs," "Not the touchie-feelie type hugs . . . kind of like a pat-on-the-back type hug . . . a non-sexual hug, a business open hug. . . . non-groping hug." (R. 101, Mannheimer, 16-17, 64-65).

1. *Kerry Keller*

In Atlanta, on October 6, 1996, the night before a company meeting, Keller met fellow employees at the hotel lounge. (Keller, 107). According to Keller, Plaintiff approached, sat on the arm of his chair, and put her arm around him. (Keller, 96-100). Plaintiff sat on the arm because there were no other chairs available. (Miller, 105).

Shortly after, Keller told Weiffenbach that he thought Plaintiff's conduct was "intrusive" – *not* that he believed it was any type of sexual advance. (R. 102, W, 40-43). Weiffenbach claims he then told Keller that if he felt that strongly, he should write a memo – which Keller agreed to do. (R. 102, W, 31).

Keller claimed that, *shortly after returning from the October 6th meeting*, he e-mailed a complaint to Weiffenbach. (Keller, 87-88, 110-111). Weiffenbach testified that he did not receive an e-mail until about *five weeks after the meeting*. (R. 102, W, 32-33).

Defendants failed to produce Keller's original e-mail "complaint". Instead, Defendants produced an e-mail from Keller dated March 14, 1997 (the day *after* Plaintiff's termination), which purported to "re-create" the information. (R. 103, Defs' Ex. 6). Given Defendants' failure to produce the original document, a question of fact existed as to whether Keller's allegations were created or embellished after-the-fact, to support Plaintiff's replacement by a male.[1]

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[1] Weiffenbach claimed that, upon his original receipt of the Keller "complaint" (in November 1996), he immediately sent the e-mail to Karlyn Oberg, the head of personnel issues, to go into Plaintiff's personnel file. (R. 102, W, 33). Directly contradicting Weiffenbach, Oberg testfied that she *first* saw the Keller document in *March 1997*. (Oberg, 27-28).

2. *December 1996 Training Session*

Two "formal complaints," for which Defendant claims it eventually terminated Plaintiff, were written by Alldata employees Mark Gunnerson and Mike Smith in March 1997. (R. 103, Defs' Exs 3, 4).

Gunnerson was Alldata's national training manager, and in charge of running a December 1996 training class in Sacramento, California. (Gunnerson, 46-47). During a class break, other employees talked about Plaintiff's (outgoing) conduct. Though some employees were surprised, *none wanted to make any type of formal complaint.* (Gunnerson, 76-77). Gunnerson claimed, however, that one employee, Smith, reported that Plaintiff had touched *him*, and that Smith was *"truly upset."* (R. 103, Defs' Ex. 4, Gunnerson, 70, 73, 75). Contradicting Gunnerson, Smith testified that Plaintiff *never* touched him and that he was *not* "truly upset" about Plaintiff's conduct. (Smith, 9, 12). Moreover, Smith did *not* believe that Plaintiff's conduct was done in a sexual manner, and he did *not* complain to anyone. (Smith, 4-6). Smith further testified that *no one* in the class had stated they believed Plaintiff was sexually harassing anyone. (Smith, 12).

Another "offensive" act cited by Defendant was Plaintiff having touched the knee of another employee, Rene Young. (R. 103, Defs' Ex. 3, 4). However, Young testified that Plaintiff's conduct was *not* sexual, that he was *not* offended by it, and that he did *not* complain to anyone. (R. 106, Young, 15-16). A group of employees (including Weiffenbach) had voluntarily gathered in the hotel lounge and were telling sexually-oriented jokes and drinking. (R. 106, Young, 11-13; Smith, 13; Evangelist, 37-38; Miller, 109-110; R. 101, Mannheimer, 75). Smith (4-5) described how the knee touching episode was extremely innocuous:

> Rene Young was sitting right to my right and then there was Karen and everybody was taking turns telling their jokes and Renee was telling his joke and he got to the punch line, Karen got real embarrassed and she kind of covered her mouth and for whatever reason I looked down and I saw her hand touch his leg, like you know that was – you couldn't believe you said that kind of a joke.

D. Weiffenbach Solicits Written "Formal Complaints" Three Months Later

It is *undisputed* that Weiffenbach was told that Plaintiff had "touched" employees *during* the December 1996 training session. Gunnerson told Weiffenbach that Plaintiff was "grabbing the other students at the back of the neck, and rubbing their necks," and that some class members were "uncomfortable." (Gunnerson, 49-52; R. 102, W, 50-51). Weiffenbach told Gunnerson *"don't worry about it,"* because he did not think there was any type of sexual advance going on, and that Gunnerson should simply instruct her to cease. (R. 102, W, 51-52).

Weiffenbach claims that about two or three weeks later Gunnerson made a verbal "formal complaint," and that he told Gunnerson if he felt strongly, to put his complaint in writing. (R. 102, W, 55-56). However, Gunnerson did not prepare his written "complaint" until March 12, 1997, almost *three months* later. (Gunnerson, 55). Weiffenbach had "written the matter off," explaining: "I figured if it was serious the people would give me this thing in writing." (R. 102, W, 60-61).

Contradicting Weiffenbach, Gunnerson testified that, *several months after* the December 1996 training session, *Weiffenbach called Gunnerson* and *directed* him to "document" what he had observed. Weiffenbach falsely told

Gunnerson that "there's been more complaints," and he needed to act. Weiffenbach made this request only "a day or two" before Gunnerson drafted his March 12, 1997, letter. As Gunnerson explained: *"If he asked me to do something, I wouldn't delay."* (Gunnerson, 55-58, 60) (emphasis added).

Defendants also cited a "formal complaint" by Mike Smith on March 1, 1997. However, Smith testified that near the end of February his supervisor, Keller, called and *directed* him to write the letter. Prior to this call, Smith had no intent to submit any type of complaint about Plaintiff's conduct. (Smith, 6-7). Keller was directed by Weiffenbach, his direct supervisor, to get documentation from Smith. (Keller, 91, 112-113).

Thus, in reality, there were no "new" complaints in March 1997, as Weiffenbach had misrepresented to Gunnerson and Oberg. Indeed, Weiffenbach *admitted* that there were *no* other incidents of alleged inappropriate behavior brought to his attention after the December 1996 training session. (R. 102, W, 63-64, 99-100). Weiffenbach was well aware of Plaintiff's conduct in December, but did *nothing* at the time. Then, in March 1997, Weiffenbach and Keller (at Weifenbach's direction), *sought out* Gunnerson and Smith and *instructed* them to write letters complaining about Plaintiff.

E. Weiffenbach Further Misrepresents The Situation To Alldata's Personnel Director

Supposedly, in response to Gunnerson's March 12, 1997 memo, Weiffenbach called Karlyn Oberg, Alldata's de-facto personnel manager, to "ask for direction." (Oberg, 7-8, 21). Oberg was "surprised" she was just learning of complaints about conduct three months earlier and "wondered why [she] didn't hear about it in

December," because Alldata's sexual harassment policy *required* complaints of sexual harassment be *promptly* reported. (Oberg, 30-31). Oberg asked Weiffenbach about the delay. (Oberg, 21-22). In response, Weiffenbach *misrepresented* that "he had just learned of the matter himself." *Id.* (Oberg, 23-24).

Weiffenbach also misled Oberg in numerous other ways. For example, when Oberg approved Plaintiff's termination, *she believed that Young had complained and had been offended.* Oberg was also surprised to hear that Smith testified that he was not "truly upset," that Smith had no intention of writing a memo until it was solicited at Weiffenbach's direction and that Gunnerson did not make a written complaint until Weiffenbach called him (a day or two before March 12) and instructed him to prepare the memo. (Oberg, 39-42).

Oberg told Weiffenbach to "investigate" the complaints; talk to people who were involved, find out the best that he could what actually transpired, and report back. (Oberg, 15-16). Weiffenbach kept Oberg apprised of his "investigation." (Oberg, 29-30).

However, Weiffenbach's subsequent "investigation" was non-existent, as it consisted *solely* of the 4/1/97 Smith memo and 4/12/97 Gunnerson memo (which he *already* had when he first called Oberg). Weiffenbach agreed there were inconsistencies between the two memos, but never called the employees to address discrepancies. Weiffenbach did *not* interview Smith, Young, Evangelist, Jeff Ambrose, or any other attendees at the training session. (R. 102, W, 73-74, 83-84, 98-99). If he had, he would have known that the two primary persons who were allegedly "extremely offended" (Smith and Young) were *not* offended, did *not* believe Plaintiff's conduct was sexual, and did not wish to make formal complaints!

Based on Weiffenbach's "investigation," Plaintiff was terminated. (Oberg, 25-26). Weiffenbach told Plaintiff that the termination "has nothing to do with your performance." (R. 102, W, 28). Weiffenbach falsely explained to Plaintiff that he had been "investigating" the prior complaints and it had taken him months. Plaintiff begged to receive probation or anything else that would allow her to keep her job. However, Weiffenbach and Oberg responded that there was nothing else they could do. (Oberg, 18; Miller, 96-99; R. 102, W, 127-129).

Plaintiff was purportedly terminated for "sexual harassment." (R. 102, W, 18, 83; Oberg, 18-19, 26). Plaintiff's termination converted Weiffenbach's sales force back to an all-male staff. (R. 102, W, 22-23).

F. Weiffenbach Replaces Plaintiff With A Male Who Was Paid Substantially More

Weiffenbach promptly hired Ed Maron to fill Plaintiff's position. (R. 102, W, 123). Weiffenbach claims that he initiated a call to Maron *after* Plaintiff had been terminated. (R. 102, W, 90-93). Contradicting Weiffenbach, Maron testified that, in March 1997, *he called Weiffenbach* to advise that he was looking for a job. Weiffenbach stated that there was nothing available at that time, but that ***"we're working on something and I'll get back to you shortly."*** (Maron, 6-8) (emphasis added). Weiffenbach later called Maron indicating that he had a position available. Maron began his employment on April 1, 1997, and started at $65,000. Then, *only three months after Maron's hire* Weiffenbach *raised* Maron's salary by *$10,000*, without any corresponding increase in job duties. (R. 102, W, 124-126; R. 105, Exs. 5, 8). Weiffenbach admitted that, upon hiring, he told Maron that he would arrange a

salary "bump" in the near future. (R. 102, W, 127; Maron, 11-12).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

A. Standard Of Review

When reviewing a renewed motion for judgment as a matter of law in a diversity case, federal courts apply the standard of review used by the courts of Michigan, whose substantive law governs the action. *Brocklehurst v. PPG Indus., Inc.*, 123 F.3d 890, 894 (CA 6 1997). The standard of review is as follows:

> In reviewing a trial court's failure to grant a defendant's motion for a directed verdict or judgment notwithstanding the verdict, we examine the testimony *and all legitimate inferences that may be drawn in the light most favorable to the plaintiff.* If reasonable jurors *could honestly have reached different conclusions,* the motion should have been denied. *If reasonable jurors could disagree,* neither the trial court nor this Court has the authority to substitute its judgment for that of the jury.
>
> A directed verdict or judgment notwithstanding the verdict is appropriate *only* when there is *no* factual dispute *upon which reasonable minds could differ.*

Id. (emphasis added, citations omitted).

B. Burden Of Proof

Reaffirming the holding of *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973), the United States Supreme

> Court in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-253, 101 S.Ct. 1089, 67 L. Ed. 2d 207 (1981), set forth the order and allocation of the burden of proof in employment discrimination cases as follows. *First*, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. *Second*, if the plaintiff is successful in proving a prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its actions. *Third*, if the defendant meets this burden, the plaintiff then has the burden of proving by a preponderance of the evidence that the legitimate reason offered by the defendant was merely a pretext. *Id.; Dubey v. Stroh Brewery Co.*, 185 Mich. App. 561, 563-564.

Featherly v. Teledyne Industries, 194 Mich. App. 352, 358, 486 N.W.2d 361 (1992).

To establish a *prima facie* case, a plaintiff must show: "(1) that [she] is a member of a protected group, (2) that [she] was subject to an adverse employment decision, (3) that [she] was qualified for the position, and (4) that [she] was replaced by a person outside of the protected class." *See, e.g., Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241, 1246 (CA 6 1995); *see also Feick v. Monroe Co.*, 229 Mich. App. 335, 338 (1998). In the case at bar, each element was undisputed: Plaintiff, a woman, was terminated, was undisputedly competent, and was replaced by a man.

Thus, the burden of production shifted to Defendants to articulate some "legitimate, nondiscriminatory reason" for firing Plaintiff. Defendants contended that Plaintiff was fired for "sexual harassment." (R. 102, W, 18, 83; Oberg, 18-19, 26). The burden of production then shifted back to Plaintiff to show that the articulated reason was a pretext for sex discrimination.

C. Plaintiff Presented Sufficient Evidence Of Pretext To Support The Jury's Verdict

Though employers have an obligation to take steps to prevent sexual harassment in the workplace, this does not, as Defendants suggest, make this case unique. The determinative question is still whether Defendants' stated reason for the termination was pretextual or unworthy of belief. *See, e.g., O'Connor v. DePaul Univ.*, 123 F.3d 665, 669 (CA 7 1997) ("As is often the case, then, the dispute comes down to the final step in the *McDonnell-Douglas* analysis, when the burden shifts back to [plaintiff] to show that the reason proffered by DePaul [sexual harassment by the plaintiff] was actually a pretext for discrimination.")

Manzer v. Diamond Shamrock Chem. Co., 29 F.3d 1078 (CA 6 1994) sets forth *three* ways that a plaintiff can establish pretext:

> To make a submissible case on the credibility of his employer's explanation, the plaintiff is 'required to show by a preponderance of the evidence either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge.'

Id. at 1084 (emphasis added, quotation marks omitted).

A finding of pretext permits a jury to *infer* discrimination. In *Manzer*, the Sixth Circuit, relying on *St. Mary's Honor Society v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), *rejected* the "pretext-plus" position, and made it perfectly clear that evidence which is sufficient for a jury to reasonably reject the employer's explanation *"will permit the trier of fact to infer the ultimate fact of intentional discrimination,* and . . . *'[n]o additional proof of*

discrimination is required.' " *Manzer*, 29 F.3d at 1083 (emphasis added).

1. *Defendants' Stated Reason Had No Basis In Fact*

Defendants' claim that Plaintiff was terminated because of complaints of "sexual harassment" had no basis in fact. No one at the December 1996 training class believed that Plaintiff's conduct was sexual in nature and no one intended to submit a formal complaint. (Gunnerson, 76-77; Smith, 4-6, 12; R. 106, Young, 15-16).

Consequently, because there was sufficient evidence to create a question of fact as to whether Plaintiff's conduct provided any basis at all to discharge (given the lack of real complaints or concerns of employees), there was sufficient evidence supporting the jury's verdict.

2. *Defendant's Stated Reason Did Not Actually Motivate The Discharge*

> The second showing, however, is of an entirely different ilk. There, the plaintiff admits the factual basis underlying the employer's proffered explanation and further admits that such conduct could motivate dismissal. The plaintiff's attack on the credibility of the proffered explanation is, instead, an indirect one. In such cases, the plaintiff attempts to indict the credibility of his employer's explanation by *showing circumstances which tend to prove that an illegal motivation was more likely than that offered by the defendant*. In other words, the plaintiff argues that *the sheer weight of the circumstantial evidence of discrimination makes it 'more likely than not' that the employer's explanation is a pretext, or coverup*.

Manzer, 29 F.3d at 1084 (emphasis added).

The evidence detailed above clearly was sufficient to show pretext under the second method. That evidence, viewed in a light most favorable to Plaintiff, demonstrated that: (1) Weiffenbach *knew* about Plaintiff's alleged "sexual harassment" *shortly after it occurred* yet did not terminate Plaintiff until *three months thereafter*; (2) Weiffenbach did nothing until *after* he received a call from Maron who indicated that he was seeking a national sales position; (3) when Oberg asked Weiffenbach why he was taking action three months after the alleged conduct, Weiffenbach *misrepresented* he had just learned of it; (4) contrary to Defendants' assertion that two employees had voluntarily submitted "formal complaints," those employees had *no* intention to submit complaints until they were *directed by Weiffenbach* to do so; (5) the two employees who wrote "complaints" were never touched; (6) no employee at the December meeting believed that Plaintiff's conduct was sexual, and the so-called complaints were greatly embellished; (7) Weiffenbach ignored Oberg's direction to investigate; and (8) Weiffenbach falsely represented that there had been new complaints.

In addition, there was substantial evidence of Weiffenbach's predisposition, including: (a) radical disparate treatment in conditions of employment; (b) sexist statements;[2] (c) Evangelist's testimony that Weiffenbach was a "chauvinist", and repeatedly referred to women in a lewd manner; and (d) significantly higher pay to Plaintiff's male replacement.

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[2] "Stray remarks" by a decisionmaker not related to disputed employment action may be relevant to pretext question under the *McDonnell-Douglas* burden-shifting approach, even though they do not constitute direct evidence of discriminatory intent. *O'Connor v. DePaul Univ.*, 123 F.3d 665, 671-672 (CA 7 1997).

Moreover, it was reasonable for the jury to conclude that if Weiffenbach *truly* believed Plaintiff's conduct had exposed the company to liability for sexual harassment, he would have done something *in December 1996*. Instead, Weiffenbach did *nothing* for almost *three months*, and then, only after being contacted by a male interested in a job, *solicited* "formal complaints" (from persons who did not even believe Plaintiff's conduct was sexual, and had no intent to complain.) Weiffenbach then used such solicited complaints (*misrepresenting* to the company's personnel director that he had *just learned* of the conduct) as a basis to terminate Plaintiff and replace her with a male whom he paid $12,500 more per year.

3. *The Roger Brandt Comparison*

Defendants infer that the prior termination of Roger Brandt for sexual harassment in 1992 somehow insulated them from liability. However, Weiffenbach was **not** the decisionmaker in Brandt's termination. (R. 102, W, 129). Additionally, the Brandt allegations constituted *true* sexual harassment, *i.e.*, kissing an employee's neck, brushing an employee's breast and "taunting her about sexual harassment," other specific charges of "sexual harassment," and actual claims by at least ten women employees. Moreover, Brandt was terminated *seven days* after the final act. Lastly, Alldata conducted a *true* investigation in Brandt's case. (R. 103, Defs' Exs. 10 & 11).

Brandt was not "similarly situated," and could not be considered comparable because he dealt with a different supervisor, engaged in blatant overt sexual conduct, and was promptly discharged. However, if the Brandt termination *was* comparable, it actually provided *additional* evidence of disparate treatment because Brandt was offered the opportunity to obtain counseling and *to be*

eligible for rehire at Alldata. *Id.* Oberg, who *was* involved in Brandt's termination, admitted that this opportunity gave Brandt a "second chance." (Oberg, 50-52). Plaintiff was given *no* such "second chance." (R. 102 W, 127-129; Oberg, 18).

D. Sex Discrimination With Regard To Terms And Conditions Of Employment

Plaintiff also proved discrimination as to "terms" and "conditions" of her employment, under a disparate treatment theory. ELCRA explicitly precludes such discrimination. MCLA 37.2201.

The Court in *Coleman-Nichols v. Tixon Corp.*, 203 Mich. App. 645, 651 (1994), explained:

> In order to establish a prima facie case of sex discrimination under the disparate-treatment theory, a plaintiff must show that she was a member of a protected class, and that, for the same conduct or performance, she was treated differently than a man.

1. *Disparate Treatment With Regard To Ed Maron*

Defendants disputed disparate treatment as to Ed Maron (whom Defendants did *not* dispute was similarly situated), because his *starting* salary, $65,000, was "comparable" with Miller's salary of $62,500. However, *only three months after hire*, Weiffenbach *increased* Maron's salary by *$10,000*, for a total disparity of $12,500.

Weiffenbach claimed the increase was because a decision had been made to terminate Evangelist, and have Maron take over part of Evangelist's national accounts. (R. 102, W, 124-126). However, Maron's salary increase

took effect on July 1, 1997 (R. 105, Pls. Ex. 8) and Evangelist was not terminated until December 31, 1997. (Evangelist, 76). Consequently, Maron's pay was increased *six months before he assumed Evangelist's duties.* (R. 102, W, 124-125). Weiffenbach had *no explanation* for why he increased Maron's salary six months before any new duties were assumed. *Id.*

Clearly, paying Maron $12,500 more than Plaintiff was strong evidence of disparate treatment. In *Coleman-Nichols, supra,* the Michigan Court of Appeals held the plaintiff established a prima facie case of sex discrimination based on disparate treatment where, among other factors, a male co-worker was paid significantly more for being a supervisor. *Id.* at 652. In any event, this was another jury issue.

2. *Disparate Treatment With Regard To Evangelist And Mannheimer*

Further evidence of disparate treatment existed in Weiffenbach's treatment of Plaintiff versus her male counter-parts, Evangelist and Mannheimer. For example, the males were paid *$25,000 more* and given the title of "director" while Plaintiff was named "manager." Additionally, Weiffenbach constantly criticized Plaintiff for not following expense guidelines, while the males regularly exceeded the guidelines and were never criticized or even instructed to follow the guidelines. Further, though Mannheimer and Evangelist openly engaged in mutual hugs with Plaintiff, Weiffenbach never reprimanded the males or told them to stop. (R. 101, Mannheimer, 65-66).

3. *Plaintiff, Evangelist, And Mannheimer Were Similarly Situated*

To be "similarly situated," the "similarity between the compared employees must exist in all the relevant aspects of their respective employment circumstances." *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (CA 6 1994). There was clearly a question of fact on this issue:

1. All three were hired within a six-month period in 1996 and reported to the same supervisor, Robert Weiffenbach;
2. All three were at the same hierarchical level in Alldata's "Special Accounts Group" as reflected in the Alldata Field Sales Organization Chart.
3. All three had previously worked as national sales reps for Alldata's competitor, the Mitchell Corporation, and had years of experience in the information industry. (R. 102, W, 100).
4. All three worked on national accounts (W, 115, Mannheimer, 60-61).
5. All three were provided with expense guidelines which, ostensibly, all were to follow (thus, "subject to the same standards").

Evangelist testified that he, Mannheimer, and Plaintiff were "peers"; made up a single national accounts "team" as they had at Mitchell; and that they each had the same job duties – "just in different market segments". (Evangelist, 20, 22, 24-26, 29). Terry Buschbach, a former Alldata sales rep, testified that the three were all at *"relatively the same level"* in the corporate hierarchy *because Weiffenbach "presented them to [him] that way,"* by indicating that he "had hired the three, that they would be working on national accounts and that I would be

supporting them as needed." (R. 100, Buschbach, 8-9) (emphasis added).

At the very least, the similarly situated issue was a question of fact for the jury. *See, e.g., Coleman-Nichols v. Tixon Corp.*, 203 Mich. App. 645, 652 (1994) ("While at this stage of the proceedings there may be some dispute regarding whether plaintiff and Gray were similarly situated [each supervised different departments], this is a factual question to be answered by the jury.")

E. Defendants Have Misstated The Law In Their Petition

In a desperate ploy to gain attention for their petition, Defendants have misstated the law. Moreover, the reason that Defendants did not receive a single vote for an *en banc* petition to the Sixth Circuit was because the legal holdings were unremarkable, and fit comfortably within the framework of prior precedent of both this Honorable Court and the Sixth Circuit.

The Defendants' first issue in the cert petition is based on two fatal flaws. First, Defendants allege that Plaintiff was an "admitted harasser", cert petition at 18, an assertion shown false by the above statement of facts. Second, Defendants argue that the mere assertion by an employer of a "good faith" belief that an employee has sexually harassed another employee, insulates a decision to discharge from any claim of discrimination. In fact, Defendants go so far as to allege, wrongly, that the decision by the Court of Appeals below was in conflict with decisions of every other U.S. Court of Appeals addressing such issues. The citations by Defendants, however, fail to support such an assertion.

Defendants first cite *Cronquist v. City of Minneapolis*, 237 F.3d 920 (CA 8 2001). *Cronquist* however, involved a

failure of a plaintiff to produce *sufficient evidence of pretext* to withstand a summary judgment motion. The Court conducted a pretext analysis, and the facts bore no resemblance whatsoever to the facts at bar. For example, the Eighth Circuit noted that nearly all of plaintiff's evidence was ". . . hearsay or double-hearsay opinions from non-decision-making officers or officials." 237 F.3d at 927. The Court ruled that such reliance could not be used to defeat a *motion for summary judgment*. The plaintiff in *Cronquist* also relied on "conjecture and surmise". *Id.* Such findings are a far cry from the record created by Plaintiff below, which not only directly challenged Defendants' cited reasons with admissible evidence, but also demonstrated, quite significantly, strong evidence of disparate treatment.

Moreover, *Cronquist* does not stray from a threshold review of the factual record to decide whether there is sufficient evidence of pretext. In *Cronquist*, such evidence was simply lacking. In the case at bar, both the District Court and the Court of Appeals found that Plaintiff had produced such evidence. Hence, at bar, Defendants are really complaining about how the jury resolved contested factual issues.

Defendants also cite *Waggoner v. City of Garland*, 987 F.2d 1160 (CA 5 1993). However, once again, review of the cited case fails to support Defendants' proposition. *Waggoner* also involved a failure to produce evidence. Plaintiff failed to provide any evidence that the employer had relied on such sexual harassment allegations in a "bad faith" pretext to discriminate. 987 F.2d at 1166.

Of course, the record at bar is replete with precisely the type of evidence missing in *Waggoner*. For example, the "delayed reaction" firing of Plaintiff, three months after the last incident, and only after a male replacement

inquired about a position; the decisionmaker's lies to the Human Resource representative Oberg about just learning of the incidents; and the ample evidence of disparate treatment, all serve to distinguish Plaintiff's case.

Obviously, each inquiry is fact-specific. In the case at bar, the district court repeatedly ruled that there were factual issues as to pretext. The Sixth Circuit affirmed only after an extensive review of the record, and, not a single judge of the Sixth Circuit voted for *en banc* consideration.

There clearly is no *per se* rule as Defendants suggest at p. 16 of their cert petition, *i.e.*, that once an employer *asserts* a belief of sexual harassment, the employer's motives are unassailable, and not subject to pretext proofs. Any such ruling would discard the well accepted framework for deciding such cases, and essentially grant immunity to employers from any discrimination suit once a mere allegation of harassment was leveled. Such a position finds no support in the law.

Each of the other cases cited by Defendants also turn on a lack of evidence to demonstrate pretext. *See O'Conner v. DePaul University*, 123 F.3d 665, 672 (CA 7 1997) (" . . . no evidence from which a rational jury might infer that Riggs lied about the reasons for his actions"). *Elrod v. Sears Roebuck*, 939 F.2d 1466, 1470-71 (CA 11 1991) ("no probative evidence to challenge" cited reasons for discharge; Plaintiff had signed report which admitted the harassment; and "no evidence" contradicted vindictive attitude towards complaining employees); *Sloan v. The Boeing Company*, 1997 WL 8868 (CA 10 1997) (*unpublished op*) ("Sloan failed to present any credible evidence on the issue of pretext.")

The reality is that there is no *per se* defense to a claim of discrimination that, once an employer *claims* a good

faith belief of harassment, the offending employee is stripped of civil rights, including the right to factually challenge the employer's cited reasons for discharge. Indeed, even Defendants have difficulty maintaining such a broadly and misstated assertion. Defendants cite this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000), Cert petition at 14, for the proposition that, *in some instances*, while Plaintiff may have established a *prima facie* case, and set forth adequate evidence to reject an employer's explanation, " . . . *no rational fact finder could conclude that the action was discriminatory.*" Defendants cert petition at 14, citing *Reeves* at 148 (emphasis added).

The above citation destroys Defendants' own premise, because unless no "rational fact finder" could determine otherwise, the decision is one for the jury. The hotly contested facts in the case at bar, obvious from even a cursory comparison of the statements of the case, demonstrate, quite strikingly, how a rational fact finder could and did rule in Plaintiff's favor.

The Defendants are really trying to assert, as they did at oral argument in the Sixth Circuit, that the trial court below was faced with an *irrational jury*. However, the Defendants have omitted and misstated so many key and contested facts, that the actual record is unrecognizable from that suggested by Defendants.

Given the hotly contested facts, the *McDonnell-Douglas* paradigm, with its burden shifting analysis, was correctly applied. Defendants imply that the application of this doctrine, as set forth by the Sixth Circuit in *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078 (CA 6 1994), was somehow inconsistent with this Court's decision in *Reeves, supra*. Cert petition at 16. This is flatly wrong, and the two decisions are in harmony, because both place the

task of resolving factual issues regarding pretext before the fact finder.

Defendants also cite *Kline v. Tennessee Valley Authority*, 128 F.3d 337 (CA 6 1997) and *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796 (CA 6 1994). Once again, Defendants' reliance is misplaced, and, upon analysis, such cases support the decisions below. Indeed, the Sixth Circuit precedent reflected by cases such as *Manzer*, *Kline* and *Pierce*, as well as the precedent of this Honorable Court in *Reeves* and *St. Mary's Honor Society v. Hicks*, 509 U.S. 502 (1993), demonstrate that the trial court's decisions were simply a straight-forward application of controlling precedent.

In *Kline*, the Sixth Circuit rejected a "pretext-plus" position, relying particularly on this Court's decision in *Hicks, supra*, 128 F.3d at 344. Hence, a plaintiff is not required to produce additional evidence of discrimination to prevail. *Id.* at 346. In instances in which a plaintiff has not factually challenged the reasons for discharge, some additional evidence of discrimination is required. *Id.* However, this rule is limited to cases in which plaintiff does not challenge the defendant's reasons for the discharge. *Id.* at 347.

In the case at bar, Plaintiff did factually challenge Defendants' stated reasons. By way of example only, Plaintiff questioned why her discharge happened months after Defendants had full knowledge of every alleged incident involving Plaintiff; why Weiffenbach obviously lied to Human Resources representative Oberg; why Weiffenbach lied as to the timing of Ed Maron's job inquiry; and why Weiffenbach actually solicited complaints from persons who had no intention of complaining.

Moreover, if additional evidence of discrimination was needed, the record was replete. Again, by way of

example only, Plaintiff, Defendants' only female salesperson, was hired at $25,000 less than two male counterparts hired in close proximity; Weiffenbach engaged in blatant disparate treatment; and Weiffenbach's history of lewd, offensive remarks toward women in general, as well as his sexist remark to Plaintiff (she was the reason he never re-married) were all before the jury. Enough said.

Next, Defendants misinterpret the holding of *Pierce*, in which the Plaintiff provided "no evidence" that the employer's reasons were a pretext for discrimination and the court found there was no triable issue of fact. 40 F.3d at 804-805. The Sixth Circuit still applied the well accepted paradigm to review whether there was any pretext evidence, and did not short-circuit the analysis by holding that a mere allegation of harassment means a plaintiff could never prove pretext, which is essentially what Defendants argue for in the cert petition.

Any ruling that a "good faith" belief, cert petition at 16, or "honest belief" *id.* at 19, should always "trump" a pretext analysis, once sexual harassment has been *alleged*, would totally disregard existing precedent. Given contested facts, the inquiry is for the fact finder. Only when no rational fact finder could find pretext, *Reeves* at 148, should the issue be foreclosed. There is no authority cited which establishes otherwise.

II. THE TRIAL COURT CORRECTLY REJECTED AN "HONEST BELIEF" INSTRUCTION WHICH WAS A MISSTATEMENT OF LAW AND CONFLICTED WITH MICHIGAN'S STANDARD JURY INSTRUCTION ON POINT

A. Standard Of Review

In *Innes v. Howell Corp.*, 76 F.3d 702 (CA 6 1996), the Sixth Circuit explained:

> The standard of review for jury instructions is that they are reviewed as a whole to determine whether they adequately inform the jury of relevant considerations and provide a basis in law for the jury to reach its decision. . . . The district court may be reversed *only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial.*

Id. at 714 (emphasis added). Defendants have not met this burden.

B. Defendant's Proposed "Honest Belief" Instruction

Defendants' proposed instruction no. 15 addressed the Defendants' "honest belief" that Plaintiff was fired for engaging in "inappropriate conduct." This instruction was inappropriate because: (1) it was a misstatement of law as shown above; (2) Weiffenbach claimed Plaintiff was terminated for "sexual harassment," not "inappropriate conduct"; (3) the jury *did* receive Michigan SJI 2d 105.03, precluding it from substituting its own judgment for the Defendants' business judgment; (4) Defendants were still free to argue (and did argue) to the jury that Plaintiff's conduct violated Alldata's sexual harassment policy; (R. 93, TR 142-144); (5) the proposed instruction was argumentative; and (6) the standard jury instructions as to discrimination were given. (R. 93, argument, 148-153). [The SJI designed "to uniformly present juries in civil cases with clear, concise and unbiased instructions to guide their deliberations." *Socha v. Passino,* 405 Mich. 458, 467; 275 N.W.2d 243, 246 (1979).]

III. Defendants' Motion For Leave To Amend Answer Was Properly Denied By The Trial Court

Defendants' motion sought leave to add the affirmative defense of "after acquired evidence," based on the Plaintiff's alleged failure to return a company computer *after* she was terminated. Plaintiff flatly denied any such misconduct and testified that she had mailed the computer back to Alldata. (R. 13). Even if Defendant's allegations were accepted as true, however, the "after-acquired evidence" defense had no application.

In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 115 S.Ct. 879 (1995), the Supreme Court held that after-acquired evidence of a former employee's misconduct can limit potential damages. *Id.* at 361. In doing so, the *McKennon* Court made it clear that the question under the "after-acquired evidence" test is whether the alleged wrongdoing would have been a sufficient basis for the plaintiff's termination *if the "employer had known about it at the time of discharge." Id.* at 362 (emphasis added). Consequently, the doctrine could not possibly apply to a plaintiff's conduct occurring *after* discharge.

Indeed, all after-acquired evidence cases discovered by Plaintiff deal only with employee misconduct that occurred *prior* to the plaintiff's termination. *See, e.g., Horn v. State Dep't of Corrections*, 216 Mich. App. 58, 548 N.W.2d 660 (1996); *Mardell v. Harleysville Life Ins. Co.*, 65 F.3d 1072 (CA 3 1995); *Wright v. Restaurant Concept Management*, 210 Mich. App. 105, 532 N.W.2d 889 (1995); *Wehr v. Ryan's Family Steakhouses, Inc.*, 49 F.3d 1150 (CA 6 1995). The Defendants vainly try to argue that Plaintiff should have still been deemed an employee for a reasonable time after her discharge, but cite no authority to support such a stretch of existing precedent. (Cert. Petition at 23.)

Where a proposed amendment would be futile, leave to amend need not be granted. *See, e.g., Glick v. Koenig*, 766 F.2d 265, 268 (CA 5 1985); *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

The trial court, in a well-reasoned opinion, denied Defendants' motion as futile. (R. 19).

CONCLUSION

Plaintiff respectfully requests that the Petition For Writ of Certiorari be denied.

Respectfully submitted,

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